No. 18642

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Miles Construction Corp.,

Appellant,

vs.

Helen H. Dempster, *et al.*,

Appellees.

APPELLANT'S REPLY BRIEF.

Forster, Gemmill & Farmer,
530 Statler Center,
900 Wilshire Boulevard,
Los Angeles 17, California,
Attorneys for Appellant,
Miles Construction Corp.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Appellant's Statement of the Case.

Parenthetically, we call attention to the following typographical errors in Appellee's quotations from the Agreement of October 8, 1956, as amended, and from Interrogatories and Answers: "Thereof" should read "hereof" in the sixth line of the quotation from Paragraph 11 on page 2; "2-½" should read "2%" in the eighth line on page 4; "and" should read "or" in the first line of Subparagraph (b) on page 4; "bond" should read "bonds" in the second line of Subparagraph 3 on page 4; the word "for" should be inserted at the end of the first line in Subparagraph (d) on page 4; the first "the" in the fifth line of Interrogatory 8 on page 6 should be deleted; and "rerurn" in the third line of Interrogatory 25 should read "return." (Other minor typographical errors have been ignored.)

Our principal quarrel with Appellee's statement of the case is that its quotation of Interrogatories and Answers out of context in several instances is, or may be, confusing, and thereby do, or may, lend some undue support to arguments made later in Appellee's Brief.

It is undisputed, of course, that the total receipts *from the Government* on the Capehart housing projects at Little Rock Air Force Base were $22,611,439.58.

However, at the bottom of page 6 and the top of page 7, Appellee apparently seeks to set the stage for an invalid argument that Miles has conceded that all costs under the Agreement of October 8, 1956, as amended, including the $100,000.00 payable to Locke, were not greater than $20,883,505.81 *at any time.* This premise is not supported by the record, whether reference is had to the interrogatories or otherwise. The record shows that the interrogatories were propounded and answered shortly prior to the trial, in 1962, and include all *adjustments* which were made through the year 1961. Therefore, when, in answer to Interrogatory No. 23, Miles computed "the base total of all costs under the agreement of October 8, 1956, as amended, before any inclusion of 2 percent thereof as additional cost as provided in the agreements" at $20,883,505.81, it was not in any sense "conceding" that *at no point* in the performance of the Contract had the costs laid out been greater than this amount. The same applies to the answer to Interrogatory No. 29.

The computation of net return in which Appellee engages at the top of page 9 likewise is not factual, but argumentative, and has a tendency to confuse the issue. What Appellee has done here is to take the 1962 figure of costs, exclusive of the 2% of other costs, in the amount of $20,883,505.81, has deducted from it $100,000.00, has added to it 2% of other costs, and thus arrived at $1,412,263.65 as net return and reaches the conclusion that net return was 6.25%. The arithmetic is good, but the premise is faulty, in that it begs the real issue here under consideration.

Actually, the facts are undisputed that, prior to the crediting of the recovery on account of the J.E.H. Construction Associates-New Amsterdam Casualty Company matter, amounting to $316,792.51, Miles' costs (including $150,000.00 accrued on its books in connection with the October 8, 1956, Agreement, as amended) was $21,659,500.12 [Ex. BI]. Thus, even if the entire $150,000.00 plus $19,462.95, as adjustment on off-site overhead, are *deducted* from this figure, actual *costs expended* remained at $21,490,037.17, yielding net return of $1,121,402.42, which is less than 6%.

If we read Appellee's Brief correctly, it is attempting to contend that Miles, in some way, through the answers to its interrogatories, has foreclosed the question of consideration of the substantial costs which Miles expended, and for which it was partially reimbursed through the J.E.H.-New Amsterdam recovery. Such is clearly not the case.

In truth, the costs were, as shown by Exhibit BI, at one point $316,792.51 *higher* than they were after the J.E.H.-New Amsterdam recovery was effected and credited, and, only after making all appropriate and relevant adjustments, was the figure set forth in the Answers to Interrogatories Nos. 23 and 29 arrived at.

REPLY TO APPELLEE'S ARGUMENTS.

I.

Introduction.

As is the case throughout Appellee's argument, its statement of the issues here is a vast over-simplification, and, therefore, an erroneous statement, of them. We respectfully refer the Court to the Summary, commencing at page 21 of our Opening Brief, for what we believe to be a correct statement of the issues.

Reply to Appellee's Argument II.

In its pristine form, that which Appellee is saying is that where two or more parties agree to dividing *profits* upon a percentage basis, it would be illogical, and, therefore, absurd, first so to divide the profits, and then deduct one party's share of the profits so divided as an "expense" in arriving at the amount to be paid to that party. We agree.

However, Appellee apparently has misled itself into believing that this is the nature of the Agreement which is the subject of this litigation. This is *not* an Agreement calling for a percentage division of net profits. Quite the contrary. It is an Agreement which calls for the payment of $100,000.00 if net return to Miles is 3%, or more, and, if net return to Miles is 6%, or more, it calls for the payment of $150,000.00.

We submit that the paragraph of Appellee's Argument commencing at the middle of page 12, and running to the middle of page 13, of its Brief, begs the basic question, and, in doing so, utterly fails to support Appellee's conclusion that Miles' contended for construction of the Agreement is absurd or illogical. Appellee suggests that we "suppose" that the net return earned were such that the inclusion of the fee of $100,-000.00 as a cost resulted in a net return in excess of

6%. This supposition is speculative, and the question which it poses need not be reached in deciding this appeal. However, our position and our argument clearly do not suggest the "endless circle reasoning" answer which Appellee puts forth. Clearly, a literal reading of the Agreement, saying, as it does, that "if, but only if" the net return to Miles is 6% shall Locke receive $150,000.00, would render tenable, if not irrefutable, the argument that Locke would be entitled to more than $100,000.00 only after there had been set aside for Miles a full 6% in net return, and, if the excess were less than $50,000.00, Locke would get only this excess. In any event, however, it is perfectly clear that if once "net return," by whatever process of computation, passes 3%, at least $100,000.00 on account of the Agreement must be added to costs, if not already there, before resolving the next question as to whether Locke is entitled to more; that, at the very minimum, this $100,000.00 must remain and be considered a part of cost in determining whether net return is more or less than 6%; and that, only if this projected a net return of 6%, or more, would Locke be entitled to either (a) $50,000.00 more, or (b) such portion of it as remained after crediting to Miles a full 6% called for by the Agreement, depending upon how this preliminary (but here moot) question was resolved.

Appellee makes no effort whatsoever to answer Appellant's argument that, once it becomes established that at least $100,000.00 is payable under the Agreement, this must be added to costs and expenses in determining net return, for the purpose of ascertaining whether or not more than $100,000.00 is payable. Instead, Appellee relies on cases so vastly different on their facts, and as to which one must strain to find any inference which arguably could support Appellee's position.

Appellee first leans heavily on *Shields v. Rancho Buena Ventura,* 187 Cal. 569, 203 Pac. 114. A careful reading of this case, together with the same case when it was previously on appeal, *Shields v. Rancho Buena Ventura,* 38 Cal. App. 696, 177 Pac. 499, demonstrates how tenuous is Appellee's argument that it controls, or is even helpful in the case at bar. As an analysis of these two Opinions requires a rather extensive quotation from them, we are placing this analysis in the Appendix.

Appellee's statement at the top of page 14 of its Brief is an erroneous one of what the Court held. At page 575, the Court was determining that, upon a balancing of credits and debits, plaintiff was entitled to *reimbursement* for $1,492.52 invested by him in the project. The Court referred to eliminating certain items, including salary accrued but not paid, only in the context of confirming plaintiff's right to reimbursement.

Except for the lonely sentence, referred to out of context by Appellee, and, in fact, not constituting any "holding", as asserted by Appellee, both Opinions, and all of their implications, are devoid of anything lending comfort to Appellee's position; on the contrary, the two Opinions, when read both together and separately, support the Appellant's position, for, if any logical parallel is to be drawn between the facts and the holdings in these Opinions, and the facts and the decision of the District Court in the case at bar, it is that *Shields* (the plaintiff) is in a somewhat similar position to *Miles* in the case at bar. Shields was to receive the *first* $1,500.00 per year of the excess of receipts over expenditures, and the defendant was to receive anything which remained. In the case at bar, Miles was to receive 3% of Contract receipts; after 3% had been set aside to Miles, Locke was to receive $100,000.00. Thereafter, Miles was to receive an additional 3% of Contract receipts, and only after it had received such additional 3% was Locke to be entitled to an additional $50,000.00.

Again, Appellee relies heavily on *Bishop v. Kelley,* 100 Cal. App. 2d 775, 224 P. 2d 814. An analysis of this opinion likewise demonstrates that Appellee's reliance upon it is not only misplaced, but that, if it has any teaching, it confirms the position of the Appellant in the case at bar. There, the defendant, Kelley, was to receive a salary and 25% of all net profits on all jobs. The trial Court laid down the rules under which the referee was to take an account between the parties, and provided that such account was to consider, as a liability, among other things, ". . . *the salary* paid to defendant . . .". (Italics added.) By implication, at least, the Court approved the portion of the order of reference requiring the accrual of salary paid to the plaintiff before computing the profit to be divided 25% to Kelley and the remainder to Bishop.

If *Bishop* has any similarity to the case at bar, and if its implied holding is of any assistance here, it is that the salary paid to, or accruable to, the account of Kelley is, like the first $100,000.00, payable under the Agreement in the case at bar, when Miles was shown to have realized a net return of 3% of Contract receipts, properly to be accrued before determining, in *Bishop,* the number of dollars, if any, to which Kelley was entitled under a division of the profits, and, in the case at bar, the question as to whether Locke was entitled to anything in excess of that first $100,000.00.

Appellee has failed to favor the Court with any explanation as to how, and in what manner, *Kales v. Houghton,* 190 Cal. 294, 212 Pac. 21; *Bernstein v. Sirotta,* 213 Cal. 21, 1 P. 2d 8; or *Boradori v. Peterson,* 86 Cal. App. 753, 261 Pac. 520, have any bearing, or are of any assistance in the case at bar. (Appellee, also, it is noted, has failed to follow here, as in all other citations to California cases, the rules of this Court, that citations are to include National Reporter System citations, Rule 18.2(a).)

Kales involved an across the board, 50/50 profit and loss arrangement. The similarity between it and the case at bar is absolutely non-existent, and it provides no help.

Bernstein does not help the Appellee, but is apposite as to the Appellant. There the plaintiff was to receive $10,200.00 in cash in semi-monthly installments of $212.50, and 20% of the net annual earnings. The clear implication is that this "salary" (like the initial $100,-000.00 after 3% of Contract receipts is set aside for Miles in the case at bar) was recognized as being considered an expense before determination of plaintiff's further share of the profits.

Boradori also is apposite as to Appellant's position. The $200.00 per month salary (like the initial $100,-000.00 after 3% of Contract receipts is set aside to Miles in the case at bar) apparently was set aside as an expense before determining the plaintiff's share of the profits. Further, the rent paid by the grocery business to the employer (like the first 3% of Contract receipts in the case at bar) also was set aside before determining plaintiff's share of the profits.

Rogers v. Hill, 289 U. S. 582, 77 Law Ed. 1385, 53 S. Ct. 731, 88 A. L. R. 744, holds nothing more than that a provision of a bylaw was not contrary to the charter, because net profits, as used in the bylaw necessarily had a different connotation than as used in the charter. Again, this was a simple across the board profit-sharing arrangement, and again, the case, if anything, supports the Appellant's position, as obviously the regular salaries payable to officers (comparable to the initial $100,000.00 after 3% of Contract receipts is set aside to Miles) were deducted as expenses before arriving at the bonuses.

We have pointed out in our Opening Brief that *Winkleman v. General Motors Corporation* (D. S. C. D. N. Y.), 44 Fed. Supp. 960, is not available to support Appellee's position, but, on the contrary, supports that of Appellant. Although that Opinion is a lengthy one, it does not disclose, on its face, the precise issue which the court was determining by the language quoted by Appellee. Certainly, it was not dealing with the question as to the 7% of capital set aside before the bonuses were arrived at. Moreover, it is manifest that it was not dealing with the question which Appellee would have this Court believe to have been the question there, and that Appellee would have the Court to believe to be the question here, namely, whether or not, in an *across the board* sharing of profits, the bonus of any given officer should be added to expense in determining that officer's bonus.

Except for what we consider to be the legitimate comparison of setting aside 7% of capital from profits to the corporation with the setting aside of 3% of Contract receipts to Miles, both in the first instance, *Winkleman* otherwise is just not our case, and the language quoted does not control it.

We come now to the Annotation in 49 A. L. R. 2d 1136. Considered in the light of this Annotation as a whole, and in the light of the authorities cited in support of the quoted statement, it constitutes nothing more and nothing less than a statement of the obvious, namely, that in an *across the board profit-sharing arrangement between an employer and an employee, or employees,* the share set aside for the employees is not properly to be diluted by considering any portion of that share to be used in determining the bonus for the employee, or the employees, sharing in that pool. This is confirmed by some of the authorities which are cited for the proposition, and particularly *Winkleman, supra.*

The Annotation follows the reporting of *Harvey v. Missouri Valley Electric Co.* (Sup. Ct. of Missouri), 268 S. W. 2d 820, 49 A. L. R. 2d 1124. It is from this case that the text writer drew the language quoted by Appellee. The question there was whether or not bonuses paid for the previous year, but paid during the current year, should be deducted as an expense in arriving at the bonuses to be paid during the current year, and the court *approved* such deduction upon the basis that there had been acquiescence in this procedure. This case, therefore, does not stand as authority for the sweeping statement in the quotation, but, even if it did, as we have pointed out above, the quotation, if correct as to an across the board profit-sharing arrangement, is not applicable to the case at bar.

Appellee's reference to certain sections of the Civil Code suggests that Appellee is now taking the position that the Agreement, which is the subject matter of this case, is ambiguous, since it apparently is requesting that the Court interpret the Contract against the promisor (Miles). This is contrary to Appellee's position at the trial that, on the main issue as to the inclusion of $100,000.00 for the purpose of determining whether or not Locke was entitled to more, the Agreement was not ambiguous. In any event, arguing that a non-ambiguous Contract should be construed against the promisor is a weak but futile reed where a litigant is attempting to induce a Court to construe an agreement contrary to its express and unequivocal language. We are somewhat puzzled by Appellee's sentence beginning at the bottom of page 17 of its Brief, and, since it is unintelligible, we must guess as to what is meant. Presumably Appellee is intending to say that the mere fact that Miles initially accrued an amount as being payable under the Agreement does not have any bearing on the amount actually payable thereunder; if so, we agree. But here we part company, because, in the very next paragraph, Appellee argues that *Miles* placed a construction upon the Agreement contrary to that for which it is now contending, and that this, in some manner, supports Appellee's position. This is such a fallacious argument as to approach frivolity. Indeed, Miles did initially accrue $135,000.00. Under its method of accounting, and under the facts as it then knew them, it could not do otherwise. Indeed, portions of this, necessarily, were reflected in its Annual Statements filed with the Renegotiation Board. Again, this was consistent with the Rules and Regulations of the Renegotiation Board, and Miles had no other choice. Appellee then says that at no time did Miles inform the Renegotiation Board that any sum less than $135,000.00 was payable under the Agreement. The significance of this fact is completely lost upon us. An examination of the Renegotiation Reports, which are in evidence and before the Court (see p. 14, O.B.), against the background of the Renegotiation Law and the Regulations thereunder, shows this to have no significance, Appellee well knows that it does not, and its statement appears to be calculated improperly to argue or suggest misconduct or wrongdoing on the part of Miles.

The Renegotiation Law and the Regulations permit a Government Contractor to report renegotiable business upon an annual basis which, of course, means that all renegotiable receipts in any given year are aggregated for gross renegotiation receipts, all renegotiable business costs and expenses paid or accrued are offset against such receipts, and resulting renegotiable profits are then examined, in the light of all of the circumstances, to determine whether or not they are excessive. Moreover, the law expressly provides that the accounting methods, if conforming to accepted standards, are to be accepted by the Renegotiation Board in making these annual determinations (50 U. S. C. Sec. 1213(i)).

The evidence shows, without contradiction, that Miles maintained its books and records on a percentage of completion basis; that it initially established $135,000.00 (having no other or better means of estimating the same at its disposal); and annually offset against Contract receipts portions of this until and including the year 1959, when all thereof was so offset. The law and the Regulations provide that where renegotiable receipts in any given year are less than $1,000,000.00, the only filing required for that year is a Statement of Non-Applicability, and that, if the Contract receipts are less than $1,000,000.00, in any given year, the profits for that year, regardless of the amount of them, are not subject to renegotiation.

The evidence shows that in no manner could it have been determined, prior to the end of the year 1959, whether or not, by whatever manner the Contract was interpreted, that Locke would be entitled to $85,000.00 or $135,000.00. Therefore, by the time this question could, by any stretch of the imagination, have been determined, the facts were such that the Renegotiation Law did not require Miles to report any revision of the amount which it previously had estimated to be the amount payable under the Agreement.

In any event, so long as Miles was threatened by this litigation, with the danger of an adjudication that $135,000.00 might thereby be determined to be payable under the Agreement, it was neither justified in revising, nor required to revise, the estimate.

The same comments, of course, apply to Appellee's argument concerning Miles' Tax Returns. The propriety of the initial accrual of this amount is not open to question, Appellee's apparent argument to the contrary notwithstanding, and, according to all sound accounting and tax principles, it should not, and cannot, be held to have been required to take back into income the $50,000.00 differential unless and until this litigation is finally determined in Miles' favor.

Nor is any significance to be attached to the purchase by Miles of $135,000.00 in Treasury Bills. Appellee apparently is criticizing Miles, in attempting to gain some "mileage" (no pun intended), at Miles' expense, for prudently establishing a reserve to meet a contingent liability then subject to litigation, and, at the same time, performing a function encouraged by the Treasury Department of placing these funds at a modest interest rate with the United States Government.

We need not belabor Appellee's further attempt to gain "mileage", at Miles expense, from the fact that Miles continued to carry the $135,000.00 upon its books (adequately answered above), or Appellee's statement that "Not until the commencement of the instant action was Miles' position any other than that $135,000.00 was payable under the agreements." Appellee, in making this argument, is fatuously suggesting, by implication, that Miles should be held to have been sufficiently clairvoyant to guess, before all of the information was at hand, that the arithmetic would work out to a gross amount of $100,000.00, and that, having failed to do so, the decision in this case should go against it.

Reply to Appellee's Argument III.

If we were to buy this argument with all of its implications, there would be no other conceivable conclusion than that Locke's assignees are not entitled to more than a gross of $100,000.00, and a net of $85,000.00.

It never has been contended, either in the trial court or here, that "Contract receipts" from the Government were anything other than $22,611,439.58. Specifically, we have never contended that the recovery (which was well after May 13, 1960) of $316,792.51 from the settlement of the J. E. H. Construction-New Amsterdam litigation was to be added to *Contract receipts*.

However, the evidence is unrefuted that Miles incurred very substantial costs in completing, itself, the work required to be performed by J. E. H. Construction Associates under the Subcontracts of that Subcontractor. [Ex. BF.] These costs as of May 13, 1960, stood as costs expended by Miles in connection with the performance of the Capehart projects. We always have conceded that a recovery of these costs, as well as *any other* recovery of costs previously expended at any time, are properly to be used, not by way of increasing Contract receipts (for they patently are not Contract receipts), but, we think properly go to reduce costs, and thereby, and to that extent, increase net return. Although Appellee now appears to be arguing, against itself, that this should not have been done, we feel, and always have felt, that it is proper. If we correctly read Appellee here, it is saying that Miles' answer to Interrogatory No. 11 forecloses consideration of the fact that the figure therein contained, of $20,504,090.61, was in fact a *net* figure *after* the reduction of costs resulting from the J.E.H.-New Amsterdam recovery.

Thus, the last sentence of this argument is literally correct in stating that recovery was not utilized in increasing receipts, but it is incorrect in its implication that the substanial post-May 13, 1960, recovery was not taken into account. It was taken into account by way of reduction of costs [Ex. B1], and is reflected in the figure set forth in the answer to Interrogatory No. 11.

Reply to Appellee's Argument IV.

We do not contend, and never have contended, that Miles was entitled to delay the calculation of net return beyond the time that the information was available to calculate it, and thereby delay payment. But Appellee has failed to tell us how it conceives that Miles could have computed net return as of May 13, 1960, when various contingent matters remained unsettled and undetermined, and when no recovery had been had or was available in connection with the J.E.H. Construction-New Amsterdam matter.

Appellee seems to be asking the Court to take some sort of judicial notice of what it states to be "usual course of practice" of the United States. No comment on this request appears to be necessary.

Appellee patently is in error in its charge that Miles "fails to illustrate one single expense paid after May 13, 1960". It stands undisputed that final settlement with the Mathis Heat Pump Company, attorneys' fees, and other expenses in connection with the J.E.H.-New Amsterdam litigation (the very recovery which is absolutely essential to entitle Locke's assignees to more than $85,000.00 under the Agreements, by whatever interpretation), and the necessary costs and expenses of Miles' defending itself against the Gary H. Reid and Texas Plumbing claims, all of which arose out of, and were directly related to, actual construction, all occurred after May 13, 1960. Manifestly, Appellee is quibbling when it charges that Miles computed net return, but yet "contended, even at trial, that it was incapable of calculating net return". We, of course, did not make this sweeping claim.

Nevertheless, it is perfectly obvious that any recovery through litigation, settlement, or otherwise, which reduces costs, and thereby increases net return, that any necessary expense incurred, either in any such litigation or otherwise, and completing and finally closing the project, and any defeat of a contended for position which would increase costs, necessarily affects the computation of net return. Since the Texas Plumbing action had not, at the time of the trial, and as yet has not, reached finality, its resolution and the payment of costs and expenses incident to it necessarily will affect the precise amount of net return.

However, there necessarily comes a time when, as a practical matter, it is possible, through engaging in comparatively simple arithmetic computations, to determine that remaining contingent claims will not affect the result, one way or the other. This now applies to the Texas Plumbing claim, a matter directly related to the actual construction, the amount of which, with a fair estimate of litigation expense, will not affect the result under the October 8, 1956, Agreement, as amended, regardless of how it is finally determined.

But until the final resolution of the Gary Reid claim, it was not known, and it could not be known, how that final result, whether considered singly or in combination with the Texas Plumbing claim, would affect the final result under the October 8, 1956, Agreement, as amended.

Although Appellee accuses Miles of taking the position that attorneys' fees, court costs, and expenses incident to the very litigation in the case at bar were to be considered in determining net return, we state, unequivocally that this is not, and never has been, Miles' position. The litigation in the case at bar necessarily stands on an entirely different footing than that arising out of and related to actual construction under the Contract between Miles and its Subcontractors, or their sureties.

Conclusion.

For the reasons advanced in Appellant's Opening Brief and above, we feel that the Judgment of the District Court should be reversed.

Respectfully submitted,

Forster, Gemmill & Farmer,
By Robert M. Sweet,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing Brief is in full compliance with those rules.

Robert M. Sweet.

APPENDIX.

Analysis of the Opinions in Shields v. Rancho Buena Ventura, 38 Cal. App. 696, 177 Pac. 499, and Shields v. Rancho Buena Ventura, 187 Cal. 569, 203 Pac. 114.

In the first Opinion, it is disclosed that the plaintiff was the owner of a little more than a quarter of the capital stock of the defendant; that the operation of the ranch had been unsuccessful, at least from a cash point of view; that the shareholders had been required to make advances to the corporation to keep the project going, apparently to the displeasure of the other shareholders; and that the contract in question was negotiated with the end in view of attempting to eliminate further cash contributions by the shareholders. The written agreement provided that the plaintiff was to keep a record of

> "receipts and expenditures . . . and shall pay and discharge at his own account and expense all of the expenses of conducting, farming and managing said ranch and property, and everything done or to be done under or in accordance with the *terms of this lease,* . . . ; and the proceeds of said ranch shall be first applied upon and in or toward the satisfaction thereof, and after all of said charges and expenses are first paid, the [plaintiff] shall have and receive for his use and benefit and as full compensation for his services, fifteen hundred dollars for each year . . . , and all of the rest, residue and remainder of said proceeds of said ranch in excess of the expenses thereof as aforesaid shall be paid over . . . to the [defendant]." (Italics added.)

It was further provided that the household and living expenses of the plaintiff and his family should be considered a part of the expenses of running and maintaining the ranch, and should be charged to and paid for out of the proceeds thereof, but not otherwise.

While the second Opinion appears to characterize the arrangement between the parties as an employment agreement, this obviously was done for the sake of simplicity, and, in the posture of the case at that time, reached the same result as if the agreement had been characterized, as it truly was, and as the written agreement so states, as a lease. The plaintiff was, in fact, a tenant farmer entitled to his living expenses plus $1,500.00 per year, if, in each year, the operation of the ranch produced this amount of money over and above the expenses of operation, with the out-of-pocket living expenses of the plaintiff and his family to be considered as a part of the expenses.

The first Opinion held that plaintiff had not produced sufficient evidence to show an excess of $1,500.00 in each year of operation.

The second Opinion held that the plaintiff had adequately shown this, and, in addition, had shown himself to be entitled to *reimbursement* of some $1,400.00, net, invested by him.